IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VOICES FOR CHOICES; AT&T COMMUNICATIONS OF ILLINOIS, INC.; MCI METRO ACCESS TRANSMISSION SERVICES, LLC; and ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES,	)	
Plaintiffs,	)	
v.	)	
ILLINOIS BELL TELEPHONE CO., INC. d/b/a SBC ILLINOIS; AMERITECH CORP. d/b/a/ SBC MIDWEST; and EDWARD C. HURLEY, ERIN M. O'CONNELL-DIAZ, LULA M. FORD, MARY FRANCES SQUIRES, and KEVIN K. WRIGHT, in their capacities as Commissioners of the Illinois Commerce Commission and Not as Individuals.	)	No.
Defendants.	)	

COMPLAINT

VOICES FOR CHOICES, AT&T COMMUNICATIONS OF ILLINOIS, INC., MCI METRO ACCESS TRANSMISSION SERVICES, LLC, and ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES (collectively "Plaintiffs"), by their attorneys, hereby complain against defendants Illinois Bell Telephone Co., Inc. d/b/a SBC Illinois, Ameritech Corp. d/b/a SBC Midwest ("SBC"), as well as the following members of the Illinois Commerce Commission (in their official capacities as Commissioners, and not individually):

Edward C. Hurley, Erin M. O'Connell-Diaz, Lula M. Ford, Mary Frances Squires, and Kevin K. Wright. In support of its complaint, Plaintiffs state as follows:

INTRODUCTION

1. In the Telecommunications Act of 1996 ("1996 Act" or "Telecommunications Act"), Congress enacted provisions of federal law (47 U.S.C. §§ 251-61) that are designed to introduce competition as quickly as possible in local telephone markets that had long been state-franchised monopolies. The 1996 Act seeks to achieve these objectives primarily by allowing new competing carriers to lease components of existing monopoly local telephone networks (called "network elements") at rates that are to represent the economic cost of the facilities and that are to be set by state utility commissions or by the Federal Communications Commission ("FCC"), subject to review in federal district court. Pursuant to these provisions, the Illinois Commerce Commission ("ICC") set rates in 1998 and subsequent years that are reasonable approximations of costs of SBC's essential local network facilities and that have allowed competing local telephone services to be offered to residential and business customers throughout Illinois. Today, over 600,000 residential customers in Illinois obtain service from AT&T, MCI, and other competing local carriers, who provide service at retail rates that are slightly below those of SBC.

2. This case arises because the Illinois General Assembly – acting at the behest of SBC – has enacted new provisions of the Illinois Public Utilities Act (§§ 13-408-09) (the "Illinois Legislation") that would put an end to this competition. (A copy of the Illinois Legislation is attached hereto as Exhibit A). The Illinois Legislation would require the ICC – by June 9, 2003 – to double the rates for one of the network elements ("the local loop") that SBC is required to provide to competing carriers. The result would be an end to existing competition, for the total cost to competing carriers of network facilities needed to compete with SBC would be so high that these other carriers would be unable profitably to compete with SBC's retail rates.

3. The Illinois Legislation would achieve this result by usurping functions that are assigned to the ICC (or the FCC and reviewing federal courts) under the Telecommunications Act and by further directing the ICC to set rates on a basis that also violates the substantive requirements of federal law. In particular, the Illinois Legislation requires the ICC to adjust SBC's existing rates by adopting positions that have been urged by SBC on contested rate-making issues in an ICC proceeding initiated by SBC. However, the positions that SBC urges are flatly inconsistent with the Telecommunications Act and the FCC's binding regulations, and the positions were thus rejected in prior ICC orders and were opposed by the ICC's Staff in the ICC proceeding that SBC initiated.

4. For these and other reasons, the Illinois Legislation is preempted by the Telecommunications Act and is invalid under the Supremacy Clause of the United States Constitution. The Illinois Legislation also violates the Contract Clause and Due Process Clauses of the United States and Illinois Constitutions and the Illinois constitutional prohibition against special legislation. Because plaintiffs would be irreparably harmed if the Illinois Legislation is implemented, plaintiffs seek a temporary restraining order or a preliminary injunction as well as a declaratory judgment and a permanent injunction against the implementation of the Illinois Legislation.

THE PARTIES

5. Plaintiff Voices for Choices ("Voices") is a not-for-profit corporation organized under the laws of the District of Columbia with its principal place of business in the District of Columbia. It is a coalition of competitive local exchange carriers, trade associations, civic groups, and consumer groups committed to implementation of the local competition provisions of the Telecommunications Act. AT&T Corp., WorldCom, Inc., and the Association of Local Telecommunications Services are some of the members of this coalition.

6. Plaintiff AT&T Communications of Illinois, Inc. ("AT&T") is an Illinois corporation with its principal place of business in Chicago, Illinois and is a wholly-owned subsidiary of AT&T Corp, which is a New York corporation with its headquarters in New York. AT&T is in the business of, among other things, providing local telephone service to residential and business customers in Illinois.

7. MCI Metro Access Transmission Services, LLC, ("MCI") is a Delaware corporations with its principal place of business in Virginia, and is a wholly owned subsidiary, directly or indirectly, of WorldCom, Inc., a Georgia corporation with its principal place of business in Virginia. MCI is in the business of, among other things, providing local telephone service to residential and business customers in Illinois.

8. The Association for Local Telecommunications Services (ALTS) is a non-profit, national trade association that represents providers of competitive local telecommunications services. ALTS is incorporated as a not-for-profit entity in the District of Columbia. Plaintiff ALTS does not join Paragraphs 52 and 64-66 of this Complaint.

9. Defendant Illinois Bell Telephone Co., Inc. d/b/a SBC Illinois ("Illinois Bell") is an Illinois corporation with its principal place of business in Chicago, Illinois. Illinois Bell is a Bell operating company and is the dominant provider of local telephone services in its incumbent service territories in the State of Illinois.

10. Defendant Ameritech Corp. d/b/a SBC Midwest ("Ameritech") is a Delaware corporation with its principal place of business in Chicago, Illinois. Ameritech is the parent of Illinois Bell.

11. Defendants Illinois Bell and Ameritech are subsidiaries of Texas-based SBC Communications, Inc. (collectively, "SBC"). SBC and its affiliates Illinois Bell and Ameritech constitute a single enterprise and function both as alter egos and agents of one another. The allegations plaintiffs raise in this Complaint are wrongs that SBC perpetrates through itself and its affiliates.

12. Defendants Edward C. Hurley, Erin M. O'Connell-Diaz, Lula M. Ford, Mary Frances Squires, and Kevin K. Wright are all residents of Illinois and Commissioners of the Illinois Commerce Commission ("ICC"). The Commissioners of the ICC are named as

defendants only in their official capacities, and not as individuals. The ICC is the state agency charged with regulating intrastate telephone services offered in Illinois.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, in that this action arises under the Constitution, law, or treaties of the United States.

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) because defendant SBC resides in this district and all of the defendants reside in Illinois.

BACKGROUND

I. The Telecommunications Act of 1996 and the Role of the States.

15. Prior to 1996, virtually all local telecommunications services in the United States were provided to customers by monopolies that were franchised by state utility commissions to serve designated geographical areas. The operators of those monopoly facilities are now known as "incumbent local exchange carriers" or "ILECs." SBC's subsidiary Illinois Bell is an ILEC and was formerly granted monopoly franchises that cover areas containing the overwhelming majority of Illinois residents.

16. In February 1996, Congress passed the 1996 Act. One of the key goals of the 1996 Act was to open local telephone markets to competition as quickly as possible. Congress did so by preempting not just the state laws that had prohibited competition with SBC and other incumbents local monopolists, but also any state law that could have the "effect" of "preventing" any carrier from offering any telephone service or that is otherwise inconsistent with the Act and the FCC's regulations. §§ 253(a), 251(d)(3), 261.

17. Because it is generally impossible for new entrants to construct alternatives to the incumbent's ubiquitous ratepayer-funded local networks, Congress granted

new entrants rights to lease pieces of the incumbent carriers' local networks – called "unbundled network elements" – on "nondiscriminatory" terms and at rates based upon the "cost" of providing those elements, 47 U.S.C. §§ 251(c)(3), 252(d)(2). Congress recognized that competition could not develop unless new entrants could use these local facilities at the same economic costs that the incumbents incur when they offer service over them, and that if incumbents could charge above-cost rates to competitors, the result would be price squeezes that foreclose competition.

18. Congress directed the Federal Communications Commission ("FCC") to promulgate national rules to be used in establishing the rates and other terms and conditions of this new federal "network element" leasing regime. 47 U.S.C. § 251(d). The 1996 Act also created detailed, federal procedures for implementing the requirements of the 1996 Act and the FCC's regulations. *See id*. § 252.

19. Competitive carriers can obtain network elements or services under tariffs or documents called Statements of Generally Applicable Terms and Conditions. However, the specific leasing rights of new entrants are generally set forth in contracts called Interconnection Agreements that are arbitrated or approved by state utility commissions (or by the FCC if the state commission fails to Act). §§ 252(c) & 252(e). The Act provides that new entrants and

incumbents are to attempt to negotiate agreements, and if they agree on particular terms (or entire agreements), these are to be approved without regard to the substantive requirements of the Act so long as they do not discriminate and are in the public interest. §§ 252(a)(1) & 252(e)(2)(A). But if the parties fail to agree on particular terms, any "open issues" are to be arbitrated by applying the substantive and procedural requirements of the Telecommunications Act and the FCC's governing regulations. §§ 252(c) & 252(e)(2)(B). State commission decisions are reviewable in the federal district courts, which have exclusive jurisdiction to order revisions to the state commissions' methods or orders. §§ 252(e)(4) & (6).

20. Sections 252(a) and (b) of the Act set forth the exclusive procedures by which a new entrant may arrive at an interconnection agreement with an ILEC. Under section 252(a)(1), a new entrant initiates the process by asking the ILEC to negotiate an agreement.

21. Carriers are permitted to reach agreements through private negotiation. In fact, the Act allows parties that are able to conclude an agreement (or parts of an agreement) through negotiation alone to disregard the substantive terms of the Act so long as the agreement does not discriminate and is in the public interest. 47 U.S.C. § 252(a)(1).

22. If the parties are unable to reach full agreement through negotiation alone, the Act requires them to petition the state commission to arbitrate any open issues. 47 U.S.C. § 252(b)(1).

23. Upon receipt of such a request, the state commission must then arbitrate and resolve the open issues, ensuring that "such resolutions and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC]" and that "rates for interconnection, services, or network elements [are set] according to [§252(d)]." 47 U.S.C. § 252(c)(1)-(2). If the state commission fails to act on such a request for arbitration, the FCC is empowered to resolve such open issues. *Id*. § 252(e)(5).

24. After an agreement is established by negotiation and/or arbitration, the parties must submit it to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then either approves or rejects the agreement in accordance with the standards set forth in the Act. 47 U.S.C. § 252(e)(2). The Act allows state commissions to adopt additional provisions that enforce or establish requirements of state law, provided that those state law requirements neither are entry barriers that violate § 253 nor are otherwise inconsistent with the Act. *Id*. § 252(e)(3). After the state commission either approves or rejects the agreement,

section 252(e)(6) provides for federal court review of the state commission determinations. *Id*. § 252(e)(6). State courts are prohibited from reviewing these orders. *Id*. § 252(e)(4).

25. The right of states to participate in the federal regulatory scheme governing local telephone competition comes with strict limits on which state entity may participate ("the State commission," 47 U.S.C. § 252(a)), when it may do so (*id*. §§ 252(b)(1), 252(e)), what processes it must employ (*id*. § 252(b)), what substantive standards it must apply (*id*. §§ 252(c), (e)), when it must render a decision (*id*. §§ 252(e)(4)), and the court before which it must defend its determinations ("an appropriate Federal district court," *id*. § 252(e)(6)).

26. If a state legislature believes the state commission is doing a poor job in setting network element rates, its exclusive remedy is to opt out of the federal scheme by prohibiting the state commission from arbitrating and approving Interconnection Agreements – in which case the Act provides that another tribunal with expertise in such matters (the FCC) will assume this responsibility. § 252(e)(5). State legislatures cannot decide that existing network element rates established pursuant to the Act are too low and direct their respective state commissions to order higher rates.

27. Notwithstanding these detailed federal requirements, opening monopoly local telephone markets to competition has proven very difficult. SBC and other incumbents

have strong incentives to resist network element-based competition through obstruction, delay and litigation, and there is still no meaningful local telephone competition in many states.

28. Illinois has fared somewhat better, however, because the Illinois Commerce Commission ("ICC") and its professional technical staff have participated in the federal interconnection agreement process since the outset and have vigilantly insisted on compliance with the 1996 Act's core requirements. Today, most Illinois customers have a choice of local telephone service providers, and over 600,000 customers now obtain service from a carrier other than SBC. However, virtually without exception, these competitive carriers provide these services by leasing network elements from SBC. Thus, local competition in Illinois remains critically dependent upon effective regulatory oversight of SBC and enforcement of the requirement that SBC lease network elements in accord with the 1996 Act and the FCC's regulations.

II. The ICC's Prior Orders And The Carrier Plaintiffs' Interconnection Agreements.

29. Over the past seven years, the ICC has conducted scores of arbitration, agreement approval and related proceedings to establish the rates and other terms and conditions of access to network elements. As a result, the terms and conditions under which many carriers lease network elements from SBC are reflected in existing interconnection agreements, each of

which generally contains hundreds of pages of negotiated and arbitrated provisions that govern the rates and other terms and conditions of access that apply to the parties to that contract.

30. The interconnection agreements of the plaintiffs include voluntarily negotiated (and ICC approved) provisions that govern amendments to agreements when there have been changes in the 1996 Act, the FCC regulations, or the ICC's substantive rules and orders due, among other things, to legislation, new regulations, or judicial decisions that revise or reverse the governing rules. These provisions state that any such amendments will occur only after the change in law has become "final and nonappealable."

31. The core elements of the local exchange are the local loop, switching, and transport. Local loops are copper or other wires that are strung along telephone poles (or buried in underground conduit pipes) and that connect each home or business to a local switch. Switches are computer-driven facilities that route calls to their destination. Transport are facilities that connect switches to each other.

32. Rates are among the most contentious and complex issues that a state commission must determine in federal section 252 proceedings. The FCC's rules adopt a "total long run incremental cost standard" (known as "TELRIC") for calculating the "cost" of network elements, and the FCC has promulgated detailed rules to implement that standard. The FCC's

TELRIC rules forbid reliance on an "embedded" or "historical" cost approach that focuses on the incumbent provider's actual expenditures or practices. Instead, the FCC rules dictate a "forward-looking" cost approach that requires a participating state commission to forecast what it would cost an "efficient" carrier today to build, operate and maintain a new local telephone network using the most efficient available technology and practices. *See* 47 C.F.R. § 51.505.

33. These forward-looking costs of a hypothetical efficient provider are not directly observable in the real world. To set rates under TELRIC, the state commission must use complex "cost models" that reflect numerous algorithms and input assumptions regarding network architecture, the most efficient technologies, material types, costs and lives, terrain and population variables and costs of capital and labor. The models are typically supplemented with detailed expert testimony from engineers and economists.

34. The ICC, like most other state commissions, has generally established section 252 network element rates through "generic" rate proceedings in which all carriers are invited to participate. Many of the rates that SBC may charge competitors for access to network elements at issue in this case – the local loop – were developed in a rate proceeding that was completed in 1998.

35. That proceeding began in September 1996 when the ICC initiated Docket 96-0486 to investigate SBC's proposed cost studies and models and that addressed the rates for all the core network elements (the local loop; transport, and switch). In December 1996, SBC filed with the ICC its prepared expert testimony supporting its cost studies. New entrant competitive carriers and ICC Staff filed responses to SBC's prepared testimony in February, April and May of 1997. And SBC filed responsive testimony in March April and May on 1997. The ICC then held evidentiary hearings – where parties were permitted to cross-examine expert witnesses – during the second two weeks of May 1997. SBC, competitive carriers, and the ICC Staff then filed post hearing briefs, reply briefs and draft orders.

36. In February 1998, the ICC issued an interim order adopting, among others, the rates that Ameritech could charge for the local loop. At SBC's request, that order was made final – and, therefore, appealable – in April 1998. That order established final rates for unbundled local loops and established interim rates for the switching element and the shared/common transport element and ordered SBC to file cost studies for the purpose of establishing permanent switching and share/common transport rates. The 137-page ICC Order carefully addresses the myriad disputed issues relating to the proper development of TELRIC-compliant network element loop rates in Illinois. In its 1998 order, the ICC addressed the two ratemaking issues that the Illinois Legislation attempts to resolve in SBC's favor. However, the

ICC rejected SBC claims and held that the use of actual "fill factors" (discussed below) and depreciation costs based on financial accounts (also discussed below) violate the governing federal pricing rules. SBC appealed this order to federal district court, but SBC withdrew this appeal before it was decided.

37. Beginning in November 2000, the ICC began the process of establishing permanent rates for SBC's local switching element and investigating the first permanent shared transport offering SBC filed in October 2000 pursuant to the ICC's mandate in its Order in ICC Docket No. 98-0555 approving the merger of SBC and Ameritech Illinois. On November 1, 2000, the ICC initiated a proceeding to investigate and establish permanent SBC switching rates (switches are small computers that control telephone traffic) and to investigate the permanent shared transport rates SBC had filed in October 2000. On July 10, 2002, the ICC, after reviewing thousands of pages of testimony, hearing transcripts, and briefs, issued its final order reducing SBC's interim switching rates and shared transport rates.

38. On September 4, 2002, SBC filed with the ICC a new tariff that proposed substantial increases to all of SBC's network element rates. However, shortly thereafter, SBC withdrew that tariff filing, and therefore no action was taken on this request for substantial increases in the network element rates.

39. Between September and December 2002, the Staff of the ICC and representatives of SBC met on numerous occasions to discuss SBC's proposed changes to its network element rates. The ICC Staff and SBC did not come to any agreement over the terms of SBC's proposed network element tariff filing.

40. On December 24, 2002, SBC submitted to the ICC a new tariff filing that proposed dramatic increases (over 150%) in SBC's loop rates, with such changes to take effect on February 7, 2002. SBC submitted cost studies and models purporting to show that TELRIC-compliant loop costs had increased significantly since 1998. However, these studies rested on positions that were previously rejected by the ICC (in Docket Nos. 96-0486/0569), including positions on "fill factors" and "depreciation rates."

41. On or about December 27, the Telecommunications Division of the ICC Staff prepared a report analyzing the impact of SBC's tariff filing (the "December 27 ICC Report"). (A copy of this Report is attached hereto as Exhibit B). The December 27 ICC Report compared the new wholesale network element rates proposed by SBC with retail rates that SBC charged to its own customers, to determine whether competing local exchange carriers ("CLECs") could still compete with SBC. The Report concludes that "a CLEC taking network elements under the proposed rates could not price its service to retail customers as low as the

currently effective rates charged by SBC Illinois." (Report, p. 2). The Report includes a table comparing the applicable rates that showed that, for residential consumers, the network element rates SBC proposed to charge were between $6.04 and $17.05 higher than the retail rates that SBC charged its own customers.

42. The December 27 ICC Report also contained the results of an "imputation test," which is a test designed to measure whether a competitor would have a reasonable opportunity to compete with SBC. The Report concluded that the proposed SBC rates failed the imputation test. *Id*.

43. The December 27 ICC Report recommended that the ICC suspend SBC's tariff filing and allot sufficient time for a thorough review of the filing. One of the principal reasons given for suspending the tariff was the fact that SBC "proposes significant increases in wholesale rates that could reduce or eliminate the ability of competitive local exchange carriers to compete in the Illinois telecommunications marketplace." (Report, p. 4). In response to SBC's December 24, 2002 request, and the ICC Staff's December 27, 2002 Report, the ICC opened Docket No. 02-0864 to re-examine loop network element rates. The ICC Staff, the Illinois Attorney General and a number of competing carriers submitted detailed expert

testimony and cost studies demonstrating that SBC's renewed requests were as violative of the federal law requirements today as they had been when the ICC previously rejected them.

44. For example, the ICC Staff demonstrated that SBC's proposals violated TELRIC because it (1) would set rates using its "actual" current fill factors to determine the amount of idle capacity that an efficient network would have, (2) would determine depreciation on the basis of accounting lives that it reports to the SEC, and (3) rested on cost models that were otherwise unlawful.

45. First, it explained that there are many reasons why an efficient telecommunications provider using the most efficient technology – the federal law standard – would not mirror SBC's extremely low actual fill factors (which reflect the fact that SBC maintains excessive amounts of spare and idle capacity). The ICC Staff explained, for example, that SBC's existing network still "reflect[s] fills for a rate-of-return regulated monopoly." Staranczak Direct Testimony at 20 (May 6, 2003) (ICC Staff witness). The ICC Staff here referenced the fact that SBC was regulated under rate-of-return regulation until quite recently, and SBC had substantial incentives to "gold plate[]" its network by installing unneeded excess capacity because SBC was permitted to earn a return on that capacity under rate-of-return regulation. Staranczak Direct Testimony at 20 (May 6, 2003) (ICC Staff witness). Indeed, the

ICC Staff showed that SBC currently maintains about *twice* as much spare capacity as a typical carrier, despite having much more stable demand. Staranczak Direct Testimony at 15-18 (May 6, 2003) (ICC Staff witness).

46. And with respect to the asset lives proposed by SBC, the ICC Staff explained again that the financial accounting lives are conservatively short and that SBC's stated reasons for adopting those proposals were baseless. SBC, for example, has claimed that its shorter depreciation lives can be justified on the grounds that new facilities are necessary to provide "advanced" services, but as the ICC Staff explains, "substantial portions of the existing network are still essential to the provision of the advance services" and that, if anything, the ability to utilize existing network facilities to provide advance services potentially extends the economic life of existing network facilities. Wagner Direct Testimony at 7 (May 6, 2003); Staranczak Direct Testimony at 27 (May 6, 2003).

III. The SBC-Sponsored Illinois Legislation.

47. SB 885 was introduced in the Illinois State Senate on February 19, 2003. As passed by the Senate and introduced in the House two months later, SB 885 was a shell or "vehicle" bill that had no substantive content. On May 6, 2003 – the same day that the ICC Staff filed its testimony finding SBC's proposed fill factors and depreciation proposals flatly inconsistent with the governing federal standards – SB 885 was "amended" to include text sponsored by SBC that directed the ICC to terminate its loop rate proceeding and, instead, simply to adopt rates based upon the SBC fill factor and depreciation proposals and SBC's cost model in the pending rate case.

48. Although little opportunity was provided for hearings or debate, the Illinois Attorney General, a participant in the proceedings before the ICC, voiced strong opposition, noting that SB 885 was "simply an attempt to obtain a legislative fix" and "to demand a specific result from the legislature because the sponsors fear that the administrative agency might not agree with their view of the issues." (Prepared Testimony of Janice Dale, Public Utilities Bureau, Illinois Attorney General's Office, dated May 5, 2003, p. 4) (Copy attached as Exhibit C). In this regard, the "legislation would direct the Commission to put its expertise and discretion aside and use a particular methodology proposed by one party – SBC –

to calculate the price phone companies have to pay SBC to access the existing network." *Id*. at 3. The Illinois Attorney General further stated that because the "Bill would increase the unbundled network element rates contained in already approved interconnection agreements," it would raise "constitutional issues." *Id*.

49. Without any modification to the SBC-sponsored text, SB 885 passed in the House on May 7, passed in the Senate on May 9 and was signed by the Governor later that same day. On the next business day, SBC filed a petition with the ICC to implement SB 885 by immediately raising SBC's loop rates by over 100% (an average of $9.15 to an average of $18.79). (ICC Docket 03-0323).

50. The Illinois Legislation applies only to rates charged by SBC, the only carrier "subject to regulation under an alternative regulation plan under Section 13-506.1." § 13-408. It declares the pending SBC rate proceeding (Docket 02-864) "abated as of the effective date of this amendatory Act." Id. § 13-408(c). It directs the ICC to institute a new proceeding in which will – within 30 days – increase SBC's loop rates by adopting SBC's proposals of "current actual fill factors" and "investment community" depreciation lives and by using the SBC "cost models and methodology" from ICC Docket 02-864 to calculate the amount of the resulting increase. *Id*. §§ 13-408(a)-(c).

51. The legislation provides that the new 30-day proceeding "shall be deemed interconnection agreement arbitration and approval proceedings under Sections 252(b) and (e) of the federal Telecommunications Act of 1996." *Id*. § 13-408(c). It further provides that "immediately upon conclusion of such proceedings, all existing interconnection agreement in this State [and all wholesale tariffs] shall be deemed amended to include the adjusted rates" and SBC "shall charge such adjusted rates." *Id*. The Illinois Legislation thus expressly overrides the change of law provisions that SBC negotiated in its interconnection agreements by making this particular change in law – that benefits SBC – take effect immediately.

52. The federal 1996 Act requires "nondiscriminatory" loop rates, *see* 47 U.S.C. §§ 251(c)(3), 252(d)(2). However, the Illinois Legislation freezes existing rates for 35,000 voice grade lines designated by each competing local carrier for a period of two years. The effect is to single out large carriers (those that provide service over more than 35,000 lines) and to exempt small carriers from the full and immediate brunt of the rate hikes. § 13-409.

CLAIMS FOR RELIEF

COUNT I: Violation of U.S. Const. Art. VI (Supremacy Clause)

53. Plaintiffs incorporate the preceding paragraphs by reference as though fully set forth here.

54. The Illinois Legislation is preempted by the Telecommunications Act and violates the Supremacy Clause of the U.S. Constitution, for four reasons.

55. **First,** by usurping the role Congress gave the ICC, the Illinois Legislation violates the procedures that the Telecommunications Act and the FCC's regulation establishes for resolving rate issues under the Act.

56. The federal Telecommunications Act in many respects has taken the regulation of local telecommunications competition away from the States and enacted new federal law obligations and procedures that broadly preempt all state laws that operate as entry barriers, that are inconsistent with the Telecommunications Act or the FCC's implementing regulations, or that otherwise "impede competition." *See* 47 U.S.C. §§ 251(d)(3), 253, 261.

57. At the same time, because state utility commissions have local knowledge, professional staffs, and expertise in rate-making and other issues, the Telecommunications Act

provides that state commission may arbitrate and approve interconnection agreements if they choose to do so (and the Act requires the FCC to perform this adjudicatory function if the state commission declines to do so, 47 U.S.C. § 252(e)(5)). Congress thus extended an invitation to the states to participate in the federal regulation of interconnection agreements, and states are free to accept or reject this offer. However, a state that chooses to participate is acting as a deputized federal regulator and must accept the conditions that are attached to that grant of power.

58. The Telecommunications Act thus preempts state laws that seek to nullify the conditions that Congress imposed on state participation. The Illinois Legislation is preempted for these reasons.

59. Here, the pertinent conditions that the Act imposes on state participation are: (1) the function of adjudicating and resolving all contested rate-setting and other factual issues is to be performed by specific state tribunals with expertise in these matters (state utility commissions), (2) these state utility commissions must adhere to prescribed procedures and apply substantive federal law standards, and (3) the role of reviewing state commission decisions and ordering rate adjustments is to performed exclusively by federal district courts. §§ 252(e)(4) & (6). By contrast, state legislatures simply have no role under the Act in addressing any of

these issues, for state legislatures neither have any expertise in rate-making issues nor are constituted to function as adjudicatory or reviewing bodies.

60. If the General Assembly believes the ICC is doing a poor job in setting network element rates, its exclusive remedy is to opt out of the federal scheme by prohibiting the ICC from arbitrating and approving Interconnection Agreements – in which case the Act provides that another tribunal with expertise in such matters (the FCC) will assume this responsibility. § 252(e)(5). The General Assembly cannot decide that existing rates are too low and direct the ICC to order higher rates by adopting the SBC's position on contested rate-making issues. Yet that is precisely what the General Assembly did here, and the Illinois Legislation violates the procedural requirements of the Act and the FCC's implementing regulations in myriad respects.

61. **Second,** the Illinois Legislation is preempted by the federal Telecommunications Act because the Illinois Legislation's new rules on fill factors, depreciation, and SBC's cost models are substantively unlawful under the FCC's TELRIC regulations and the Telecommunications Act requires that rates be set in conformity with the FCC's TELRIC regulations.

62. TELRIC prohibits the ICC from basing rates on SBC's "actual," "historical" or "accounting" costs, and instead requires strict adherence to a new "forward-looking" methodology that forecasts the costs that a hypothetical new provider would incur to build, operate and maintain a local telephone network using "the most efficient telecommunications technology currently available and the lowest cost network configuration." *See* 47 C.F.R. §§ 51.501, 51.503, 51.505. The FCC has specifically held that uses of "actual" fill factors violate TELRIC and that financial reporting lives are impermissible unless certain findings are made. But the Illinois Legislation directs the ICC to ignore these rules and to base SBC's rates on SBC's "actual" fill factor, on its "accounting" depreciation lives, and on a "cost model" that further inflates these unlawful inputs.

63. **Third,** the Illinois Legislation is preempted insofar as it purports immediately to amend the Interconnection Agreements established between carriers and SBC and to abrogate the provisions that bar amendments to the agreements that are based on legislation that revises the cost and pricing standards adopted by the Act, the FCC's regulations, or the ICC's prior orders until such time as those legislation changes become "final and nonappealable." Under the Telecommunications Act, this provision was approved because it is nondiscriminatory and consistent with the public interest, and once approved, the Act require

that the interconnection agreement be enforced in accordance with the terms until it is superceded by a new agreement. §§ 251(c)(2) & (3).

64. **Fourth,** the Illinois Legislation is preempted by the federal Telecommunications Act because the Illinois Legislation's provision that freezes rates for the first 35,000 voice grade equivalent lines that a carrier serves for two years and immediately doubles rates for all other loops constitutes discrimination that violates § 251(c)(3) of the Telecommunications Act.[1]

65. The Illinois Legislation "grandfathers" for two years loop rates for the "first" 35,000 voice grade equivalent lines that a competitive carrier in Illinois serves. § 13-409(a). In effect, this means that the average loop cost that a "small" competitive carrier (*i.e.*, a carrier that serves less than 35,000 lines) is significantly lower than the average loop costs incurred by larger carriers that currently serve more than 35,000 lines. Similarly, whereas a small competitive carrier can still gain new customers at the existing loop rate, *id.*, large carriers must pay the new, higher loop rate for all additional customers that they win (assuming that it is even possible to viably offer local service at the new, higher rates). Thus, under the Illinois Legislation, larger carriers are required to pay much more (whether measured by the average rate

[1] Plaintiff ALTS does not join this claim or Paragraphs 52 and 64-66 of this Complaint.

or the incremental rate) for unbundled loops than smaller carriers. And given the magnitude of the loop rate increases mandated the Illinois Legislation, the Illinois Legislation immunizes SBC from competition from the largest competitive carriers that are most likely to challenge its local dominance, permitting competition by only small niche carriers that will be unable to eliminate SBC's local monopolies.

66. The Telecommunications Act and the FCC rules expressly prohibited such discrimination. Section 251(c)(3) of the Act expressly requires incumbent carriers to provide "nondiscriminatory access" to network elements to "any" requesting carrier. Likewise, the FCC's implementing rules requires that "[t]he terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers." 47 C.F.R. § 51.313(a). The Illinois Legislation violates these provisions by singling out large carriers for disadvantaged treatment while exempting small carriers from the full brunt of the new law.

COUNT II: Violation of U.S. Const. Art. I, § 10 (Contracts Clause)

67. Plaintiffs incorporate the preceding paragraphs by reference as though fully set forth here.

68. In 1997, AT&T and SBC signed an Interconnection Agreement (the "Interconnection Agreement").

69. In the Interconnection Agreement, the parties agreed upon a procedure to addresses changes in applicable state law. Section 29.3 of the Interconnection Agreement, which addressed this issue, states as follows:

> **29.3 Amendment or Other Changes to the Act; Reservation of Rights**. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. In the event of any amendment of the Act, or any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises or reverses the Act, the FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an "**Amendment to the Act**"), either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its rights and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority.

70. The Interconnection Agreement entered into between AT&T and SBC thus provides that any such changes will not be incorporated into the agreement until after the change becomes final and all appeals are exhausted. Section 29.3 is applicable here because the Illinois Legislation revises and reverses the FCC's First Report and the ICC's prior orders that reject actual fill rates and accounting depreciation lives. This provision was voluntarily negotiated by both parties and has provided protections to each by ensuring that neither party is subjected to potentially unlawful regulatory changes while those changes are challenged in court.

71. The Illinois Legislation abrogates this provision of the interconnection agreement. It mandates that "immediately upon conclusion" of the Commission's proceedings effectuating the new rates mandated by the Act "all existing interconnection agreements in this State of affected incumbent local exchange carriers shall be deemed amended to contain the adjusted rates . . . ." *See* 13-408(c). Notwithstanding the clause in the interconnection agreement providing otherwise, the Illinois Legislation immediately subjects AT&T to the new, higher rates before AT&T has exhausted available legal challenges.

72. As such the Illinois Legislation retroactively abrogates a term in an existing contract in violation of Article I, Section 10 of the U.S. Constitution. The Illinois Legislation substantially impairs AT&T's rights under the Interconnection Agreement. At the

same time, the Illinois Legislation's abrogation of Section 29.3 of the Interconnection Agreement, which allows AT&T to test the legality of the new rates before becoming liable to pay for them, does nothing to further the purposes of the 1996 Act, or any other valid societal purpose.

COUNT III: Violation of Ill. Const. Art. I, § 16 (Contracts Clause)

73. Plaintiffs incorporate the preceding paragraphs by reference as though fully set forth here.

74. The Interconnection Agreement entered into between AT&T and SBC thus provides that any such changes will not be incorporated into the agreement until after the change becomes final and all appeals are exhausted. Section 29.3 is applicable here because the Illinois Legislation revises and reverses the FCC's First Report and the FCC's prior orders that reject actual fill rates and depreciation lives. This provision was voluntarily negotiated by both parties and has provided protections to each by ensuring that neither party is subjected to potentially unlawful regulatory changes while those changes are challenged in court.

75. The Illinois Legislation abrogates this provision of the interconnection agreement. It mandates that "immediately upon conclusion" of the Commission's proceedings

effectuating the new rates mandated by the Act "all existing interconnection agreements in this State of affected incumbent local exchange carriers shall be deemed amended to contain the adjusted rates . . . ." *See* 13-408(c). Notwithstanding the clause in the interconnection agreement providing otherwise, the Illinois Legislation immediately subjects AT & T to the new, higher rates before AT&T has exhausted available legal challenges.

76. As such the Illinois Legislation retroactively abrogates a term in an existing contract in violation of Article I, Section 16 of the Illinois Constitution. It substantially impairs AT&T's rights under the Interconnection Agreement. At the same time, the Illinois Legislation's abrogation of Section 29.3 of the Interconnection Agreement, which allows AT&T to test the legality of the new rates before becoming liable to pay for them, does nothing to further the purposes of the 1996 Act, or any other valid societal purpose.

COUNT IV: Violation of Ill. Const. Art. IV, § 13 (Special Legislation)

77. Plaintiffs incorporate the preceding paragraphs by reference as though fully set forth here.

78. The Illinois Legislation constitutes impermissible "special legislation" in violation of Article IV, Section 13 of the Illinois Constitution.

COUNT V: Violation of U.S. Const. Amendments 5 and 14 (Due Process)

79. Plaintiffs incorporate the preceding paragraphs by reference as though fully set forth here.

80. The Illinois Legislation violates plaintiffs' due process rights in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully requests that the Court enter judgment in their favor, declare that the Illinois Legislation is preempted by the Telecommunications Act of 1996 and the FCC's implementing regulations and is unconstitutional, and grant such other and further relief as this Court deems just and equitable, including preliminary and permanent injunctive relief.

Respectfully submitted,

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